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IN THE
COURT OF APPEALS OF INDIANA

JUDYMAE K. ADAMS,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 60A01-0511-CV-519
	)	
LOUIE D. ADAMS,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE OWEN CIRCUIT COURT
The Honorable Lori Thatcher Quillen, Judge Pro-Tempore
Cause No. 60C01-0502-DR-17

March 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Judymae K. Adams appeals the denial of her motion to correct error following the dissolution of her marriage to Louie D. Adams.[1] We affirm in part, reverse in part, and remand.

Issues

Judymae raises six issues, which we consolidate and restate as follows:

I. Whether the trial court abused its discretion in denying her motion for continuance;

II. Whether the trial court complied with Indiana Code Section 31-15-7-5 in its distribution of the marital estate;

III. Whether the trial court abused its discretion in denying her request for spousal maintenance; and

IV. Whether the trial court abused its discretion in failing to grant her request for a new hearing.[2]

Facts and Procedural History

On April 26, 1993, Judymae and Louie were married. Prior to their marriage, the parties had lived together for sixteen years. They had no children. On August 1, 2003, the

[1] On appeal, Louie represents himself. As attorney pro se, he identifies himself as "Louie D. Adams Jr.". However, his name appears as "Louie D. Adams" in the captions of the court documents in the record before us. In order to avoid confusion, we identify him consistent with these court documents.

parties separated, and Judymae moved to Florida. On February 1, 2005, Louie filed a petition for dissolution of marriage.

On March 21, 2005, Judymae sent a letter to the trial court requesting that an attorney be appointed to represent her. She also sought representation through the District 10 Pro Bono Project, but on March 28, 2005, she was informed that they were unable to take her case. On April 8, 2005, Louie filed a motion to compel discovery. On April 13, 2005, Judymae sent another letter to the trial court requesting a court-appointed attorney. On April 22, 2005, Louie filed a motion for sanctions. The trial court set a hearing on the motion for June 8, 2005. On May 2, 2005, Judymae sent a fax to the trial court again requesting a court-appointed attorney and including verification of her income to demonstrate eligibility. The trial court granted Judymae a thirty-day extension to respond to discovery requests. On June 6, 2005, the court-appointed attorney entered his appearance on behalf of Judymae and filed a motion for continuance. The trial court rescheduled the June 8, 2005, hearing for August 8, 2005. On July 14, 2005, Judymae sent the necessary documentation to her court-appointed attorney so that he could respond to Louie's discovery requests.

On August 8, 2005, a final hearing on the dissolution petition was begun. At the

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[2] Judymae also claims that the trial court abused its discretion in denying her request for attorney fees incurred after the final dissolution hearing. Appellant's Br. at 2. Our review of the record establishes that the trial court set the matter for hearing and granted Judymae's motion to continue the hearing, and that neither party appeared at the hearing. Appellant's App. at 8-9. We have held that it is an abuse of discretion to award attorney fees where the trial court failed to "consider the resources of the parties, their economic condition, the ability of the parties to engage in gainful employment and to earn adequate income, and such other factors as bear on the reasonableness of the award." *Allen v. Proksch*, 832 N.E.2d 1080, 1102 (Ind. Ct. App. 2005); *see also Bertholet v. Bertholet*, 725 N.E.2d 487, 501 (Ind. Ct. App. 2000); *Barnett v. Barnett*, 447 N.E.2d 1172, 1176 (Ind. Ct. App. 1983). Due to Judymae's failure to appear at the hearing in person or by counsel, the trial court was unable to hold an evidentiary hearing to consider the necessary factors. Thus, the trial court was within its discretion to deny Judymae's request for attorney fees.

hearing, Louie objected to Judymae's evidence of marital debt on the basis of her failure to produce responses to his discovery requests. Judymae's court-appointed attorney confirmed that he had received the necessary information from Judymae on July 14, 2005, and that he thought that he had hand-delivered it to Louie's attorney. Tr. at 24. The trial court rescheduled the remainder of the hearing to September 15, 2005, and gave Judymae fifteen days to produce the requested documents and information. However, Judymae's court-appointed attorney did not meet the fifteen-day deadline. On August 31, 2005, Louie filed a second motion for sanctions, stating that Judymae had responded to the request for production of documents but had not answered the interrogatories. On the same day, Judymae's court-appointed attorney filed answers to interrogatories. On September 2, 2005, the court-appointed attorney filed Judymae's interrogatories. That same day, Judymae retained pro bono representation from the Community Legal Clinic, Indiana University School of Law, Bloomington. On September 6, 2005, an attorney from the Community Legal Clinic entered his appearance on behalf of Judymae and filed a motion for continuance. The same day, the trial court denied the motion.

On September 15, 2005, the final hearing was held. Judymae was represented by her new pro bono counsel and a legal intern under the attorney's supervision. On September 21, 2005, the trial court issued its decree of marriage dissolution, which includes in relevant part the following:

> 7. Court Orders [Louie] to pay his attorney fees as well as the attorney's fees owed to Owen County for the cost of respondent's attorney in the amount of $400.00.
> 8. Court awards [Judymae] the home and Orders that she pay the Internal Revenue Service debt owing on the home.

9. Court Orders [Judymae] to pay the credit card debts owing to Citibank, Statewide Credit Association, Bank of America, Chase, Discover, MBNA America, Sears Card Cycles.
10. Court Orders [Judymae] to pay any debt in her individual name.
11. Court Orders [Louie] to pay any debt in his individual name.
12. Due to the fact that the Court Ordered [Louie] to pay all the attorney fees, the Court, being duly advised, now Orders [Judymae] to pay the judgment owing to Bill Perkins and the credit card debts.
13. Court awards [Judymae] her bicycle and spoons.
14. Court awards [Judymae] all personal property currently in her possession.
15. Court awards [Judymae] the 2000 tax refund.
16. Court awards [Judymae] fifty percent (50%) of any retro military benefits.
17. Court denies [Judymae's] request for maintenance.
18. Court awards [Louie] all personal property currently in his possession, excluding the bicycle and spoons awarded to [Judymae].
19. Court awards [Louie] his disability and military disability income.
20. Court awards [Louie] fifty percent (50%) of any retro military benefits. Court Orders [Louie] to cooperate in the filing for said military benefits.

Appellant's App. at 11-12.

On September 30, 2005, a new attorney entered an appearance on behalf of Judymae and filed a consolidated petition to stay decision and reschedule final hearing, which was denied on October 3, 2005. On October 20, 2005, Judymae filed a motion to correct error, which was denied on October 25, 2005. This appeal ensued.

Discussion and Decision

As a preliminary matter, we hereby grant Judymae's motion to strike Louie's appellee's brief. The brief contains numerous factual allegations that are wholly unsupported by the record, does not address the contentions raised in Judymae's appellant's brief, and

completely fails to comply with Indiana Appellate Rule 46(B).[3] This court may not consider matters outside the record. *Rothschild v. Devos*, 757 N.E.2d 219, 221 n.2 (Ind. Ct. App. 2001). Further, it is well settled that pro se litigants are held to the same standard as are licensed lawyers. *Goossens v. Goossens*, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005). Therefore, we will disregard appellee's brief and review Judymae's arguments as though Louie had failed to file a brief. *See Taylor v. Landsman*, 422 N.E.2d 403, 405 n.1 (Ind. Ct. App. 1981) (noting that where motion to strike appellee's brief is granted, the appeal is reviewed as though appellee failed to file a brief). Where a party fails to file a brief, we may reverse upon a showing of prima facie error. *Brower Corp. v. Brattain*, 792 N.E.2d. 75, 77 (Ind. Ct. App. 2003). Prima facie means "at first sight, on first appearance, or on the face of it." *Id*.

I. Motion For Continuance

Judymae challenges the trial court's denial of her September 6, 2005, motion for continuance. The decision whether to grant or deny a motion for continuance lies within the sound discretion of the trial court, and we will reverse only upon an abuse of that discretion. *Litherland v. McDonnell*, 796 N.E.2d 1237, 1240 (Ind. Ct. App. 2003), *trans. denied*. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts of the case. *Id*. The moving party must be free of fault and demonstrate that his or her rights were prejudiced by the denial. *Id*.

Judymae argues that she was not receiving adequate representation from her court-

[3] Indiana Appellate Rule 46(B) requires an appellee's brief to comply, with certain exceptions, with the requirements for appellant's briefs set for in subsection 46(A). Accordingly, an appellee's brief must contain a table of contents, a table of authorities, a summary of the argument, and an argument that addresses the contentions raised in the appellant's argument. Ind. Appellate Rule 46(B). The argument must also be

appointed attorney and needed to find new counsel to protect her interests. She asserts that her new pro bono attorney would have been able to present her case much more effectively if he had had more time to prepare.[4] In support of her argument, Judymae cites *Hess v. Hess*, 679 N.E.2d 153 (Ind. Ct. App. 1997).

In *Hess*, the parties' marital dissolution hearing was scheduled for March 13, 1996. On March 8, 1996, four days prior to the hearing, Mr. Hess's attorney filed a motion to withdraw his appearance. By letter *on the same day*, Mr. Hess's attorney advised Mr. Hess that the hearing was set for March 13, 1996, and that Mr. Hess needed to contact another attorney to represent him. Mr. Hess's attorney did not move for a continuance on Mr. Hess's behalf but suggested to Mr. Hess that he contact the trial court to request a continuance. On March 11, 1996, a Monday, Mr. Hess filed his pro se motion for continuance. On March 13, 1996, the trial court heard a brief argument on Mr. Hess's motion, denied the motion, and proceeded with the dissolution hearing. We held that the trial court had abused its discretion in denying Mr. Hess's motion for continuance. *Id*. at 155. In so holding, we noted that there was nothing in the record to show that Mr. Hess intended or could foresee that counsel would withdraw so close to the hearing and that the denial of the continuance deprived him of counsel at the most crucial stage in the proceedings. *Id*. at 154-55. In fact, Mr. Hess was unable even to present his case-in-chief.

The noteworthy circumstances present in *Hess* that led us to reverse the trial court's

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supported by cogent reasoning, citation to the authorities, statutes, and appendix or parts of the record on appeal. App. Rule 46(A).

denial of the motion for continuance are simply not present in the instant case. Judymae did not experience the unexpected withdrawal of her counsel just days before the hearing. Instead, Judymae made the considered decision to terminate her court-appointed attorney. While we recognize that her court-appointed attorney had not timely responded to Louie's discovery request after she had given him the required information, his actions at the time Judymae terminated his representation indicate that he was not ignoring his responsibility to prepare for trial. He had responded to Louie's discovery request and also filed Judymae's interrogatories in preparation for trial. Judymae made the decision to hire new counsel knowing that the hearing was a little over two weeks away. Although it may be true that, given more time to prepare, Judymae's pro bono counsel could have presented Judymae's case more effectively, the record does not demonstrate that he was unable to make an effective presentation. We note that two weeks permits counsel *some* time to prepare. Most significantly, unlike the moving party in *Hess*, Judymae was not completely deprived of counsel at the most crucial stage of the proceedings. While it may have been within the trial court's discretion to grant Judymae's motion for continuance, we cannot say that Judymae has established that her rights were prejudiced by the denial of her motion such that the trial court's denial was against the logic and effect of the facts in the case.

II. Distribution of Marital Estate

Next, Judymae challenges the trial court's distribution of the marital estate.

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[4] Judymae also argues that she was justified in terminating her court-appointed attorney due to a conflict of interest that was created by Louie's motion for discovery sanctions and Louie's allegation that she should have to reimburse the county for her attorney. We are unpersuaded that any conflict of interest was thereby created.

> The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. When a party challenges the trial court's division of marital property, [she] must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal. We may not reweigh the evidence or assess the credibility of the witnesses, and we will consider only the evidence most favorable to the trial court's disposition of the marital property. Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court.

DeSalle v. Gentry, 818 N.E.2d 40, 44 (Ind. Ct. App. 2004) (citations omitted).

Indiana law requires that marital property be divided in a "just and reasonable manner" and provides for the statutory presumption that "an equal division of the marital property between the parties is just and reasonable." Ind. Code § 31-15-7-5. This presumption may be rebutted, however, by relevant evidence that an equal division would not be just and reasonable. *Id*. Such relevant evidence includes

> (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
> (2) The extent to which the property was acquired by each spouse:
> (A) before the marriage; or
> (B) through inheritance or gift.
> (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
> (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
> (5) The earnings or earning ability of the parties as related to:
> (A) a final division of property; and
> (B) a final determination of the property rights of the parties.

Id. If the trial court determines that a party opposing an equal division has met his or her burden under the statute, the trial court must state its reasons for deviating from the

presumption of an equal division in its findings and judgment. *Chase v. Chase*, 690 N.E.2d 753, 756 (Ind. Ct. App. 1998).

Here, the trial court failed to make findings as to the value of any marital assets and debts. It also failed to indicate whether it was dividing the marital estate equally between the parties or was deviating from an equal division, and, if the latter, its reasons for doing so. The trial court's allocation of the marital debt would seem to indicate that the trial court did not divide the marital debt equally between the parties. In essence, the trial court awarded Judymae *all* of the marital debt without explaining its reasons for doing so. In paragraph 12 of the dissolution decree, the trial court ordered Judymae to pay the judgment owing to Bill Perkins and the credit card debt because Louie is ordered to pay her attorney fees. We fail to discern any justification for ordering Judymae to pay approximately $14,000 in marital debt while Louie was required to pay only $400 in attorney fees.[5] In determining a just and reasonable division of the marital estate, the trial court may also consider that the record shows that Judymae supported Louie during the marriage and that she owned the home prior to the marriage. Accordingly, we remand to the trial court for a valuation and distribution of

[5] We note that Louie was granted a discharge under Section 727 of Title 11 of the United States Bankruptcy Code on February 5, 2003. Appellant's App. at 68. Among his discharged debts were the judgment due Bill Perkins and the credit card debt. Louie's bankruptcy discharged his obligation to the creditor. Judymae did not file for bankruptcy and remains responsible for these debts. Therefore, the debts remain part of the marital estate and should be considered in determining a just and reasonable distribution of the marital estate. Further, we note that the statement of financial affairs Louie filed with the bankruptcy court establishes that his losses include $4,500 in riverboat gambling. *Id*. at 73. This could support a finding of dissipation of marital assets.

the marital estate that is in compliance with Indiana Code Section 31-15-7-5.[6]

III. Spousal Maintenance

Judymae next contends that the trial court erred in denying her request for spousal maintenance. In the absence of an agreement between the parties, the trial court's authority to order maintenance is restricted and limited to three options: incapacity maintenance for a spouse who cannot support him or herself, rehabilitative maintenance for a spouse who needs additional education or training before seeking a job, and caregiver maintenance for a spouse who must care for an incapacitated child. *Cannon v. Cannon*, 758 N.E.2d 524, 525-26 (Ind. 2001) (citing *Voigt v. Voigt*, 670 N.E.2d 1271, 1276-77 (Ind. 1996)); Ind. Code § 31-15-7-2. In order to award maintenance, a trial court must make the findings required by the statute. *Cannon*, 758 N.E.2d at 526; Ind. Code § 31-15-7-1.

Here, Judymae seeks incapacity maintenance. Incapacity maintenance may be awarded where the trial court "finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected." Ind. Code § 31-15-7-2(1). Our supreme court has stated that strict construction

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[6] We note that in paragraph 15 of the dissolution decree, the trial court awarded Judymae "the 2000 tax refund." Appellant's App. at 12. However, the record does not contain any evidence that she received a 2000 tax refund. Instead, the record shows that there was a federal tax lien on all her property for unpaid income taxes for the tax period ending December 31, 2000. *Id*. at 59. The parties were married and living together that year, so this debt should be considered marital debt. The record also establishes that she overpaid her income taxes in 2004 and that the overpayment was applied to reduce the aforementioned unpaid income taxes. *Id*. at 62. Therefore, she did not receive a refund. This analysis also reveals that the trial court should reconsider paragraph 8 of the dissolution decree. Paragraph 8 awards Judymae "the debt owing on the home." *Id*. at 11. As just discussed, while the Internal Revenue Service may have placed a lien on the home, the debt relates to income taxes for the tax period ending in the year 2000. Therefore, even if Judymae is awarded the home, it does not follow that she should be solely responsible for paying the debt owed to the Internal Revenue Service.

principles apply to Indiana Code Section 31-15-7-2(1), and therefore the trial court's discretion to award maintenance is limited. *Cannon*, 758 N.E.2d at 526. Specifically, the supreme court stated, "Where a trial court finds that a spouse is physically or mentally incapacitated to the extent that the ability of that spouse to support himself or herself is materially affected, the trial court should normally award incapacity maintenance in the absence of extenuating circumstances that directly relate to the criteria for awarding incapacity maintenance." *Id.* at 527.

In the case at bar, Judymae contends that the trial court failed to explain its decision to deny her request for maintenance. However, the statute requires the trial court to make findings when it awards maintenance, not when it denies maintenance, and Judymae does not cite any authority that supports her position that the trial court is required to make findings when it denies a request for maintenance. Here, the trial court has not made findings upon this issue, and therefore the general judgment standard of review controls. *D.A.X., Inc. v. Employers Ins. of Wausau*, 659 N.E.2d 1150, 1155 (Ind. Ct. App. 1996). We will affirm the general judgment upon any legal theory supported by the evidence introduced at trial. *Id*. We neither reweigh the evidence nor judge the credibility of witnesses. *Shelby Eng'g Co. v. Action Steel Supply, Inc.*, 707 N.E.2d 1026, 1027 (Ind. Ct. App. 1999). We view only the evidence most favorable to the judgment. *Id*.

The undistputed evidence shows that Judymae is disabled and was approved for and subsists on disability retirement benefits from the United States Postal Service. Judymae therefore argues that there are no "extenuating circumstances" that justify the denial of incapacity maintenance. *See Cannon*, 758 N.E.2d at 527 ("[T]he trial court should normally

award incapacity maintenance in the absence of extenuating circumstances that directly relate to the criteria for awarding incapacity maintenance."). However, the record also shows, and Judymae concedes, that Louie is also 100% disabled and subsists on social security disability payments and veterans disability payments. Despite Judymae's argument to the contrary, we believe that Louie's disability is an extenuating circumstance that goes to the discretionary power of the trial court to deny spousal maintenance.

Judymae claims that a more prosperous party's own disability does not preclude an award of maintenance, citing *Paxton v. Paxton*, 420 N.E.2d 1346 (Ind. Ct. App. 1981). It likewise does not necessarily require it. *Paxton* stands for the principle that the language of the dissolution statute *does not prohibit* "a trial court in its discretion from requiring an 'incapacitated' spouse to pay maintenance to a spouse specifically found to be mentally or physically incapacitated." *Id*. at 1349.[7] The *Paxton* court explained, "whether a husband is incapacitated goes to the court's discretion to award maintenance, not to its power." *Id*. Thus, the incapacity of the spouse from whom maintenance is sought and the ability to provide for his or her own needs are factors that the trial court may consider in exercising its discretion to award incapacity maintenance.

The trial court's discretionary power to award incapacity maintenance where both spouses are incapacitated is illustrated by our Court's decision in *Melnick v. Melnick*, 413

[7] At the time *Paxton* was decided, the trial court's discretion to award incapacity maintenance was governed by Indiana Code Section 31-1-11.5-9(c). For purposes of our analysis, the subsequent recodifications of the maintenance statute, currently Indiana Code Section 31-15-7-2, have not substantively changed the language governing incapacity maintenance.

N.E.2d 969 (Ind. Ct. App. 1980).[8] There, Mrs. Melnick sought incapacity maintenance from Mr. Melnick. Mrs. Melnick was sixty-four, had developed osteoarthritis of the spine, resulting in frequent and considerable pain, and was unable to work. Mr. Melnick was sixty-eight, had infantile paralysis, could not stand on his feet for long periods of time, and had been unable to obtain employment during the two years prior to the dissolution hearing. The trial court denied Mrs. Melnick's request for incapacity maintenance. We affirmed the trial court, stating that "there was evidence concerning the age and physical capacities of [Mr.] Melnick from which the court could reasonably have concluded it was inappropriate, under the circumstances, to make a maintenance award to Mrs. Melnick." *Id*. at 972.

The instant case is similar to *Melnick*. There is evidence of Louie's incapacity and ability to provide for himself from which the trial court could have concluded that it was inappropriate, under the circumstances, to award incapacity maintenance to Judymae. We therefore conclude that the trial court did not abuse its discretion in denying incapacity maintenance to Judymae.

IV. New Hearing

Next, Judymae asserts that the trial court erred in failing to grant a new hearing so that she could establish that Louie concealed marital assets. We review the trial court's decision to grant or deny a new trial for an abuse of discretion. *Deree v. All American Shipping Supplies, Inc.*, 718 N.E.2d 1214, 1215 (Ind. Ct. App. 1999). An abuse of discretion occurs where the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences that may be drawn therefrom. *Id*. On review, we neither weigh

[8] Indiana Code Section 31-1-11.5-9(c) was in effect at the time *Melnick* was decided.

the evidence nor judge the credibility of witnesses. *Id*.

Specifically, Judymae argues that Louie made a number of implausible or contradictory assertions regarding the status and value of property in the marital estate and that she was unable to explore her suspicions that Louie was concealing assets from her because the trial court denied her September 6, 2005, motion for continuance. Judymae's argument for reversal, insofar as it is based on allegedly implausible or contradictory testimony, is merely an invitation for this court to reweigh the evidence. We may not accept this invitation. *See id*. (concluding that, where plaintiff argued that defendant's inconsistent testimony indicated that defendant had concealed evidence, the basis of plaintiff's argument for a new trial was merely an invitation to reweigh the evidence).[9] Accordingly, we conclude that the trial court did not abuse its discretion in denying Judymae's request for a new trial.

Conclusion

In sum, we affirm the trial court's denial of Judymae's motion for continuance. We reverse the trial court's distribution of the marital estate and remand for a distribution that is just and reasonable. We affirm the trial court's denial of Judymae's request for incapacity maintenance. We affirm the trial court's denial of Judymae's request for a new hearing.

Affirmed in part, reversed in part, and remanded.

SULLIVAN, J., and SHARPNACK, J., concur.

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[9] Judymae also cites *In re Marriage of Bradach*, 422 N.E.2d 342 (Ind. Ct. App. 1981), to support her argument that this Court has ordered a new trial where it appeared possible that a new trial would reveal additional evidence that could sustain her contentions. However, that case is inapposite. In *Bradach*, we reversed the trial court and remanded for a new hearing after the trial court held a hearing on Mrs. Bradach's concealment claim. Here, the trial court determined that a hearing on Judymae's concealment claim was unwarranted.